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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, which applies to public lands "in Alaska," extinguished Alaska Natives' aboriginal hunting and fishing rights outside the three-mile territorial limits of the State of Alaska?

2. Whether Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 *et seq.*, which applies to public lands "in Alaska," protects Alaska Natives' hunting and fishing rights outside the three-mile territorial limits of the State of Alaska?

3. Whether the United States holds title to the mineral resources of the Outer Continental Shelf so as to bring oil and gas leases under the Conservation Act's definition of "Federal lands"?

4. Whether Secretary Hodel can rely on post-sale evaluations to rationalize why Secretary Watt and Secretary Clark failed to comply with the mandates of Section 810 of the Conservation Act when holding OCS Lease Sales 57 and 83?

5. Whether Section 810 of the Conservation Act—which directs that certain studies and evaluations take place "[i]n determining whether to . . . lease" and which provides that "[n]o such . . . lease . . . which would significantly restrict subsistence uses shall be effected"—applies to leasing?

6. Whether an order enjoining exploration and development on tracts leased in violation of Section 810

of the Conservation Act was an appropriate remedy when the parties against whom the injunction issued had earlier represented to the court that the proper remedy for a violation of Section 810 was a permanent injunction rather than an order voiding the lease sales?

7. Whether an injunction is the appropriate remedy for a violation of a statute whose plain language and purposes can only be effectuated and implemented by immediate injunctive relief?

8. Whether the oil companies, in proceeding to bid at OCS Lease Sales 57 and 83, could justifiably rely on Interior's interpretation of the Conservation Act when they were party defendants in a lawsuit challenging that interpretation?

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STATUTES

Relevant provisions of Title VIII of the Alaska National Interest Lands Conservation Act (Conservation Act), 16 U.S.C. § 3101 *et seq.* and the Alaska Native Claims Settlement Act (Claims Settlement Act), 43 U.S.C. § 1601 *et seq.* are reproduced in the appendix to this brief. (1a-4a).

STATEMENT OF THE CASE

A. INTRODUCTION

This case seeks to ensure that the statutory and common law protections for the hunting and fishing rights of Alaska's aboriginal people are applied fairly and consistently. The respondents are the tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti. The tribal villages of Gambell and Stebbins are federally recognized Indian Tribes.[1] The village of Gambell is located on St. Lawrence Island, an island situated near the Soviet Union in the Bering Sea. The village of Stebbins is located on the northeastern shore of the Yukon River Delta, an estuary bordering Norton Sound and the Bering Sea. Nunam Kitlutsisti is an intertribal organization representing 56 villages in the Yukon-Kuskokwim Delta. With a name literally translated from Yupik Eskimo as the "defender of life and land," Nunam Kitlutsisti has the mission of promoting and protecting the traditional hunting and fishing rights of its members.

This case concerns two Outer Continental Lease Sales: OCS Sale 57 and OCS Sale 83. OCS Sale 57 (Norton Sound) was held on March 15, 1983. The sale offered 429 oil and gas leases to 2.4 million acres of the OCS lying under the waters of Norton Sound. OCS Sale 83 (Navarin Basin) was held on March 16, 1984, about one year after the Norton Sale. It offered 3,700 oil and gas leases to

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[1] 51 Fed. Reg. 25,115 (July 10, 1986).

approximately 24 million acres of the OCS in the geologic formation called the Navarin Basin.

Unchanged from the date of filing in 1983, the legal claim advanced by the tribal villages is that Interior held both sales in either derogation of or wrongful reliance on one of two statutes which delimit the hunting and fishing rights of Alaska Natives. (JA 18). The two statutes are the Alaska Native Claims Settlement Act[2] and Title VIII of the Alaska National Interest Lands Conservation Act.[3] The Claims Settlement Act settled the aboriginal land claims of Alaska Natives, extinguishing in the process aboriginal title to lands situated "in Alaska." Part of the land claims settlement, Title VIII of the Conservation Act protects hunting and fishing on lands the title to which was extinguished by the Claims Settlement Act.[4] Both Acts apply to lands situated "in Alaska." Although they use precisely the same terms, relate to precisely the same subject matter, and are derived from a common document, Interior insists they should be construed inconsistently. Its position is that the Claims Settlement Act extinguishes aboriginal rights on the OCS but that the Conservation Act does not protect similar rights in the same area.

The tribal villages contend, and the court of appeals held, that this inconsistent position is contrary to the controlling language of the two statutes. The two statutes apply to the same geographic area. If neither the Claims Settlement Act nor the Conservation Act applies to the OCS, Alaska Natives retain their aboriginal rights, and oil exploration and development must proceed in a manner consistent with these claims as well as Interior's trust

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[2] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. § 1601 *et seq.*

[3] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.*

[4] D. Case, ALASKA NATIVES AND AMERICAN LAWS 299 (1984).

responsibility. Alternatively, if both statutes apply to the OCS, oil development on the OCS must proceed in a manner consistent with the procedural and substantive protections provided by Congress in the Conservation Act.

B. THE IMPORTANCE OF SUBSISTENCE HUNTING AND FISHING RIGHTS

To fully appreciate why Congress could not have intended that the Conservation Act and the Claims Settlement Act be construed inconsistently, it is necessary to understand the importance of subsistence to the physical and cultural survival of Alaska's Native peoples. The hunting and fishing rights at issue in this case are critical to the well being of Alaska Natives. Although a life of fishing and hunting may be a quaint anachronism for an industrial society, cultural forces and lack of integration into the Western cash economy join together to make it the prime focus of life in rural Alaska.

Subsistence is loosely defined as the harvest of wild resources to provide food and raw materials for personal use, sharing, and distribution to kin, in accordance with established custom and tradition.[5] A cyclical process, it begins when Alaska Natives harvest fish and game. It continues as they directly consume it, share it, exchange it on local trade networks, or sell it for cash. Cash is then used to buy hunting and fishing equipment, with the process being completed when that equipment is used in further harvesting efforts.

Subsistence activities are central to the economy of western Alaska and the Bering Sea region.[6] Rural Native

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[5] See R. Little and L. Robbins, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: ST. LAWRENCE ISLAND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) [hereinafter Little and Robbins]. *See also* 16 U.S.C. § 3113 (defining "subsistence uses" for the purposes of the Conservation Act).

[6] See generally LITTLE AND ROBBINS, *supra* n. 5; A. Fienup-Riordan,

Alaskans have little access to the cash economy. Few can find jobs, for industry does not exist. Cash incomes must come from occasional wages, state or federal transfer payments, or a combined strategy in which one member of the family works while another hunts and fishes.[7] Living in rural Alaska is also expensive. The high cost of living is largely attributable to the high transportation costs of shipping over great distances in inclement weather.

The net result of low incomes and a high cost of living is poverty. Native Alaska constitutes a Third World within the United States. Many Native Alaskans are fluent only in their native tongue, and most live under conditions unknown elsewhere in the United States. The poverty here is broad and deep. In 1978, the per capita income in the Norton Sound region (Wade Hampton) was only 16% of the average United States per capita income.[8] In practice, this poverty translates into a lack of social amenities such as bathrooms, running water, and telephones.

Alaska Natives have traditionally relied upon subsistence hunting and fishing to overcome this lack of economic opportunity. The economic importance of these activities is illustrated by the fact that the value of food secured by subsistence hunting and fishing frequently exceeds cash incomes. In 1976, the annual value of a subsistence harvest for a family of four in western Alaska was $13,000. At the same time, the average cash income for the same family was approximately $5,263.[9]

NAVARIN BASIN SOCIOCULTURAL SYSTEMS ANALYSIS, Alaska OCS Socioeconomic Studies Program, Technical Report No. 70 (January 1982).

[7] *See, e.g.*, State of Alaska House Research Agency, PERSONAL INCOME IN THE LOWER YUKON-KUSKOKWIM REGION (1982).

[8] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 57, NORTON SOUND (1982) [hereinafter Norton FEIS] at Table III.B.4.-3.

[9] R. Wolfe, AN ECONOMIC ANALYSIS OF FOOD PRODUCTION IN A WESTERN ALASKA COMMUNITY 23 (1977).

In addition to its economic importance, subsistence hunting and fishing is central to the Eskimo's cultural survival. To an Eskimo, language, culture, spiritual beliefs, customs, and respect for others and for oneself are all tied into a holistic world-view centered around the traditional hunting, fishing, and gathering way of life. Critical life activities are centered on hunting, fishing, and sharing harvests with family and fellow villagers.[10] Because subsistence is crucial, disruptions of subsistence activities are likely to result in significant adverse changes in the cultural well-being and stability of western Alaska Native communities.[11]

C. THE NATIVE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

Since subsistence hunting and fishing is so economically and culturally important to Alaska Natives, it is unsurprising that issues relating to these activities have been key elements in the two major statutes dealing with the rights of Alaska Natives, the Claims Settlement Act and Title VIII of the Conservation Act. As implied by its name, the Claims Settlement Act was a settlement between the United States and Alaska Natives. With the support of the Nixon administration, the oil industry, and Alaska Natives, it was passed to resolve land claims that threatened to block construction of the Trans-Alaska oil pipeline.[12] The terms of the settlement provided for an extinguishment of aboriginal claims in exchange for money, fee title to fewer lands, and protections for subsistence uses. The Act established thirteen regional corporations and various vil-

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[10] Norton FEIS, *supra* n. 8, at 48-49.

[11] LITTLE AND ROBBINS, *supra* n. 5, at Chapter XV; J. Jorgensen, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: NORTON SOUND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 90 (January 1984) [hereinafter JORGENSEN] at 327-354.

[12] J. Hanrahan and P. Gruenstein, LOST FRONTIER: THE MARKETING OF ALASKA 95 (1977)

lage corporations and awarded these corporations three major forms of compensation: money; royalties from oil, gas, and mineral leases; and 40 million acres of unallocated federal lands. 43 U.S.C. § 1601 *et seq.*

The Act did not, however, expressly protect subsistence uses. Although initial drafts included subsistence provisions,[13] the eventual agreement was based on the congressional representation that Interior and the State of Alaska would adequately protect those uses. To achieve this result, Congress instructed the Secretary of the Interior to provide for the subsistence needs of Alaska Natives.[14]

When Interior failed to heed this admonition, Congress was forced to act. 126 Cong. Rec. 29,278 (November 12, 1980) (statement of Representative Udall). Resurrecting language earlier deleted from drafts of the Claims Settlement Act,[15] it included in Title VIII of the Conservation Act systematic and comprehensive protections for subsistence hunting and fishing. With respect to the disposition of public lands, the Act declares that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence. . . ." 16 U.S.C. § 3112(1). It further declares that all leasing must allow, to the maximum extent possible, "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* To achieve these ends, Section 810 requires land managers to carefully evaluate the impact of leasing on subsistence uses and resources, and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence activities, the land

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[13] *E.g.*, S. 3859, 90th Cong., 2d Sess. (1968); S. 1830, 91st Cong., 1st Sess. (April 15, 1969); S. 35, 92d Cong., 1st Sess. (1971).

[14] Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250.

[15] *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120(a).

manager, before issuing any leases, must ensure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public land; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses. 16 U.S.C. § 3120(a)(1)-(3).

Congress ensured that the Conservation Act would apply to all lands affected by the Claims Settlement Act. The Conservation Act covers all conceivable federal rights, placing "lands, waters, and interests therein" under its umbrage. 16 U.S.C. § 3102(1). The geographic coverage is similarly broad. Mirroring and applying co-extensively with the Claims Settlement Act from which it was derived, the Conservation Act protects all federal lands "in Alaska." 16 U.S.C. § 3102(3).

D. INTERIOR'S INCONSISTENT IMPLEMENTATION OF THE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

After Congress passed the Conservation Act in 1980, Alaska Natives hoped that Interior would develop the lands to which aboriginal title had been extinguished in a manner consonant with their subsistence uses. The need for careful development was evident with respect to OCS leasing. Interior predicted that OCS leasing would directly reduce subsistence harvests by killing some percentage of the fish and wildlife taken for subsistence purposes. It further predicted that OCS leasing would substantially increase the human population over a short period of time. This population increase would place additional pressure on existing stocks of fish and game, introduce significant inflation into the subsistence economy, and rend the social fabric. Interior indicated that a sale as modest as Norton Sound would lead to an increase in crime, suicide, alcoholism, drug abuse, venereal disease, and poverty.[16]

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[16] NORTON FEIS, *supra* n. 8, at 46-47, 134-35.

Despite the compelling case for a studied consideration of subsistence uses and needs, Secretary Watt made clear he would pay them no heed. His attitude was illustrated by his reaction to suggestions that OCS leasing might seriously disrupt the subsistence activities of Alaska Natives. Responding to these concerns, he cavalierly insisted that "35,000 people on the edge of the world" would not influence his plans to lease the Alaskan OCS.[17]

In practice, his refusal to consider subsistence users when conducting OCS leasing was expressed in an inconsistent application of Title VIII and Section 4(b) of the Claims Settlement Act. The inconsistency originated in *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ___U.S.___, 106 S. Ct. 68 (1985) (*Inupiat Community*). There, Inupiat Eskimo asserted aboriginal title to OCS lands which they had traditionally used and occupied. To defeat these claims, Secretary Watt took the position that the Claims Settlement Act abolished aboriginal hunting and fishing rights outside the territorial waters of the State of Alaska. He argued that a technical interpretation restricting the term "in Alaska" to the territorial sea would be "tortured." The oil companies, also parties in that case, alleged that the phrase was geographically descriptive and that such a use was "a perfectly natural one."

After adopting the position that the Claims Act applied to the OCS, Secretary Watt then took precisely the opposite position with respect to Title VIII. His theory for ignoring Title VIII was premised on the assumption that the Conservation Act could not be interpreted as applying beyond the State's territorial waters. Without holding hearings or otherwise opening the administrative process to public comment, Secretary Watt concluded that the term "in Alaska" did not include the OCS.

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[17] The Wall Street Journal, March 12, 1986, at 64.

E. *GAMBELL I* AND *GAMBELL II* COMPEL INTERIOR TO CONSISTENTLY IMPLEMENT THE CLAIMS SETTLEMENT ACT AND TITLE VIII OF THE CONSERVATION ACT

The tribal villages of Gambell and Stebbins called into question Interior's attempt to create a gap in the protections for the subsistence uses of Alaska Natives when they filed this case on March 4, 1983. Their claim was that the term "in Alaska" had to be construed consistently. As used in two sister statutes—the Claims Settlement Act and Title VIII of the Conservation Act—the term was either geographically or technically descriptive. If geographically descriptive, Title VIII applied to OCS leasing. If technically descriptive, Alaska Natives retained their aboriginal rights beyond the marginal sea because such rights had not been extinguished by the Claims Settlement Act.

The suit forced Interior to justify an inconsistent application of an identical term in two sister statutes. The resulting response lacked grace. Before the tribal villages filed *Gambell I*,[18] Secretary Watt and the oil companies had contended in *Inupiat Community* that the phrase "in Alaska" referred to an area lying beyond the high tide mark. After *Gambell I* was filed, they contended that the phrase could not possibly have that meaning, and that it described a limited geographic area lying inside the marginal sea. The oil companies, largely conceding that the Claims Settlement Act did not apply to the OCS, argued that paramount federal authority abolished aboriginal title. Secretary Watt, conceding that the statutes were vague, contended that their geographic scope had to be resolved by their legislative history. That history, he further argued, demonstrated that Congress intended for the two sister statutes to apply to totally different areas.

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[18] *Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1974) (Fed. Pet. App. 44a).

The Court of Appeals for the Ninth Circuit rejected these claims, holding that the term "in Alaska" had the same meaning in the sister statutes. Eschewing the alternative of reading the term technically, it held that the phrase was geographically descriptive, encompassing areas outside as well as inside the territorial waters of the State.[19] It determined that the Claims Settlement Act extinguished Native hunting and fishing rights outside the three-mile limit and that Title VIII of the Conservation Act protected similar rights in the same area. *Gambell I*, 746 F.2d at 579, 582.

The court of appeals did not, however, void the sale as requested by the tribal villages. It refused this request at the urging of both the Secretary and the oil companies. To avoid having the sale voided, the Secretary and the oil companies conceded that should the court find that the Conservation Act applied to OCS leasing, the tribal villages would be entitled to an injunction. *See Gambell I*, 746 F.2d at 582; *Village of Gambell v. Hodel*, 774 F.2d 1414, 1417 (9th Cir. 1985) (*Gambell II*). Accordingly, the court of appeals remanded the matter to the district court for the limited purpose of deciding whether the sale should be voided or whether further activities should be permanently enjoined. *Gambell I*, 746 F.2d at 582-83.

In spite of their representation to the *Gambell I* court that an injunction was the proper remedy, the Secretary and the oil companies reversed their position on remand and argued that an injunction was not an appropriate remedy. They claimed that Interior had fully and completely, albeit indirectly, complied with the Conservation Act when following the mandates of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* To buttress this claim, they submitted a post-sale evaluation purporting to

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[19] *See Gambell I*, 746 F.2d at 573; *Inupiat Community*, 746 F.2d at 571.

fulfill all the statutory requirements of the Conservation Act. Published about a month after the tribal villages had moved for a preliminary injunction, the document asserted that leasing Norton Sound would not significantly restrict subsistence uses. (Fed. Pet. App. 81a).

The district court rejected the inadvertent compliance argument but failed to issue the preliminary injunction. Expressing a natural skepticism that the Secretary could "inadvertently comply" with the Conservation Act, it judged that the Secretary had violated the statute on a number of counts. Chief among the violations were the Secretary's failure to prepare subsistence studies for the two challenged lease sales with the precepts of the Act clearly in mind and his failure to give the notice, hold the hearings, and make the findings required by Section 810(a)(1)-(3) of the Conservation Act. Nevertheless, the district court failed to enter the injunction requested by the tribal villages. Without explaining its reason or rationale, and without expressly balancing the equities, it summarily concluded that an injunction was not an appropriate remedy in the case. (Fed. Pet. App. 37a-43a).

The court of appeals reversed. Noting that Interior and the oil companies had previously represented to it that an injunction was the appropriate remedy, it determined that the district court erred in not granting the tribal villages this relief. *Gambell II*, 774 F.2d at 1416-17. The court of appeals based its decision on traditional equitable principles as well as its finding that injunctive relief was the only available remedy for leasing in violation of the Conservation Act. Following this decision, Interior and the oil companies petitioned for a writ of certiorari on issues presented by both *Gambell I* and *Gambell II*. The tribal villages cross-petitioned on the issue of whether the Claims Settlement Act extinguished aboriginal title to the OCS. The Court granted Interior's and the oil companies' petitions. It took no action on the villages' cross-petition.

SUMMARY OF ARGUMENT

Alaska Natives hold aboriginal title to portions of the OCS or, as the court of appeals found, the Conservation Act protects their subsistence uses on all OCS lands.

I. Alaska Natives hold aboriginal title to portions of the OCS. Federal common law as well as the Outer Continental Shelf Lands Act recognize the prior possessory interests of Alaska Natives to offshore ice and water areas which they have traditionally used and occupied. These aboriginal claims survived the passage of the Claims Settlement Act because that Act does not contain the plain and unambiguous language needed to extinguish them. Accorded all the respect due a fee simple interest, these possessory interests preclude development of the off-shore lands they encumber.

II. Title VIII of the Conservation Act applies to the OCS in the event the Claims Settlement Act is construed as extinguishing aboriginal title to that area. Alaska Natives agreed to the passage of the Claims Settlement Act based on the representation that their subsistence uses on affected lands would be protected. Title VIII fulfills that promise. In language taken from a draft of the Claims Settlement Act, it applies to precisely the same lands and waters as does the Claims Settlement Act. If the Claims Settlement Act applies to the OCS, so does the Conservation Act.

III. If the Conservation Act applies to the OCS, Interior must comply with Section 810 before leasing public lands. The plain language of the statute dictates that compliance precede leasing. The legislative history and purposes of the Act also support Section 810's application at the lease sale stage.

IV. An injunction is the appropriate remedy for violations of Section 810. Traditional equitable principles—the probability of success on the merits, the balance of hard-

ships, and the public interest—favor the grant of injunctive relief. The plain language of the statute requires one. Section 810 represents a congressional determination that leasing decisions cannot be made, and leases cannot be issued, until Interior has fully complied with procedures designed to incorporate subsistence needs into all leasing decisions. The only available remedies for a violation of Section 810 are an order voiding the sale or an order enjoining exploration until the Secretary achieves compliance, if that is possible as a factual matter.

V. Finally, the claim that Section 810 should not be retroactively applied to the Norton and Navarin Basin Sales, even if the Act generally applies to OCS leasing, must be rejected on factual grounds. The record demonstrates that this case does not involve a retroactive application of the Conservation Act.

ARGUMENT

I. ALASKA NATIVES HOLD ABORIGINAL TITLE TO PORTIONS OF THE OCS.

The court of appeals found that the Claims Settlement Act extinguished aboriginal title to the ice and waters traditionally used and occupied by Alaska Natives. This decision is irreproachable to the extent it consistently applies the Claims Settlement Act and Title VIII. If the Claims Settlement Act applies to OCS lands and waters, so does the Conservation Act. Yet the obverse of this proposition is equally true. If the Conservation Act does not apply to OCS lands and waters, neither does the Claims Settlement Act. In this case Alaska Natives hold aboriginal title to OCS lands they have traditionally used and occupied.

The law of aboriginal title was originally developed by Chief Justice John Marshall in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). That decision found that when European governments "discovered" the United States, they asserted paramount sovereignty to this land, obtain-

ing a fee title good against all other European governments. 21 U.S. (8 Wheat.) at 572-79. But their title was not free of all encumbrances. The original Natives retained possessory interests by virtue of their use and occupancy—a right which has generally been described as "original Indian title," "aboriginal Indian title," or "Indian title."

Marshall reasoned that the legal rights conferred by aboriginal title flowed from these general principles. Because aboriginal title was an encumbrance on the sovereign's fee, it could only be transferred with the consent of the sovereign. Moreover, while aboriginal title was good against all third parties, it could be extinguished at will by the sovereign holding the fee. Finally, where the federal government was sovereign, aboriginal title was presumed valid unless specifically extinguished. 21 U.S. (8 Wheat.) at 591-92; *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1251 (1985).

Later cases developed the principle that federal law does not countenance penumbra extinguishments of aboriginal title. Because aboriginal title can be summarily extinguished, this Court has required that Congress unambiguously exercise its termination powers. It has held that congressional intent to extinguish Indian title "must be plain and unambiguous" as well as that a congressional decision to terminate aboriginal rights "cannot be lightly implied." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346, 354 (1941). *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Pigeon River Co. v. Charles W. Cox Ltd.*, 291 U.S. 138, 160 (1934).

This Court has also held that aboriginal title appertains to interests in waters and submerged lands. The principle that Indians can hold title to interests in navigable streams and waters was first announced in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Justice Marshall found

that the Cherokee Nation held navigation rights to the Tennessee River. Four later cases affirm this decision, each finding that Native groups can hold aboriginal title to fishing rights in navigable waters. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *Carter v. Hawaii*, 200 U.S. 255 (1906); *United States v. Winans*, 198 U.S. 371 (1905); *Damon v. Hawaii*, 194 U.S. 154 (1904).

Related cases provide that aboriginal use of water establishes title to the associated submerged lands. *Montana v. United States*, 450 U.S. 544, 550 at n.1 (1981). *See Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Resolving competing tribal and state claims to submerged lands, these cases decide whether exceptional circumstances overcome the strong presumption that the United States does not convey an ownership interest in submerged lands held in trust for the states pursuant to the "equal footing" doctrine and applicable principles of constitutional law. *See Oregon ex. rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Although each of these cases ultimately disposes of the tribal claims differently, depending on their individual facts, they collectively find that aboriginal use of navigable waters by Native tribes and bands gives rise to aboriginal title claims to the associated submerged lands.

These principles find that Alaska Natives hold aboriginal title to those portions of the Alaskan OCS which have served as their traditional hunting and fishing grounds. No aboriginal group has used the coastal water and ice as extensively as the Eskimo. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. The resulting ice areas resemble the tundra, permitting the Eskimo to treat the ice as land. They set up camps on the ice. They build roads on it. And, most importantly,

they hunt and fish on it.[20] In addition, the Eskimo have traditionally secured the majority of their resources from ice and water. Because the tundra is largely devoid of natural resources, the Eskimo have traditionally relied on the sea for food, clothing, fuel, and the basic materials for making hunting equipment such as kayaks and harpoons.[21] As a result of their profound reliance on the sea, the Eskimo do not sharply distinguish between land and water. As put by one commentator:

> The use of coastal ice and water by Alaska's Native people is remarkable—greater than their use of land in some major areas. Beyond the quantity of their use, their methods of use were exceptional. Whether it was Eskimo use of ice in the North, Aleut use of water on the Chain, or Tlingit activity on the fjords of the South, lives were so centered on the water that the lines which we imagine separate land from water disappeared.

K. Josephson, ALASKA AND THE LAW OF THE SEA: USE OF THE SEA BY ALASKA NATIVES—A HISTORICAL PERSPECTIVE 91 (1974).

This use and occupancy gives rise to cognizable claims to coastal lands and water. This Court has previously recognized that Alaska Natives hold aboriginal title to areas they have traditionally used and occupied. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). For almost half a century Interior has taken the position that this title extends to all waters and submerged lands over which the United States asserts sovereignty. *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461 (1942). Based on precedent issued by this Court, this controlling authority flatly holds that the use of coastal ice and water "estab-

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[20] R. Nelson, HUNTERS OF THE NORTHERN ICE (1969).

[21] *Id.*; N. Chance, THE ESKIMO OF NORTH ALASKA 9 (1966)

lishes possessory rights in Alaskan waters and submerged lands." 57 Interior Dec. 461, 476.

The United States recognized these possessory rights when it extended paramount sovereignty over the OCS. In 1953 the federal government enacted the OCSLA, asserting jurisdiction and control over the OCS, and claiming title to all mineral interests in those lands. But this extension of federal power did not secure to the United States unfettered rights and interests. Pursuant to the principles of international and federal common law announced by Chief Justice Marshall in *Johnson v. McIntosh*, Alaska Natives retained a subordinate possessory interest based on their prior occupancy and use. This principle is expressly recognized by the OCSLA. The Act states that it does not "affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to" its provisions. 43 U.S.C. § 1342. Confirming this plain language, the accompanying legislative history states that this savings clause applies to rights, such as aboriginal title, which were recognized as a matter of federal law and policy after the United States acquired sovereign control pursuant to the doctrine of discovery. The House Report makes this point as follows:

> [The Act] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, *such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be recognized and confirmed.*

H.R. Rep. No. 695, 82d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Ad. News 1395, 1411 (emphasis added).

These aboriginal claims to coastal waters and submerged lands were not extinguished when Congress passed the Claims Settlement Act in 1971. To abolish aboriginal title, Congress must consciously decide to terminate that subordinate interest, consciously address the nature and scope of the termination, and then craft a statute whose language plainly and unambiguously expresses its decisions. The Claims Settlement Act fails this test. It contains no language "plainly and unambiguously" extinguishing aboriginal title on the OCS. The Act merely terminates Indian title to lands "situated in Alaska," a phrase susceptible of two interpretations. Used in a technical sense, it describes the area lying within the territorial boundaries of the State of Alaska. Used in a geographical sense, it describes the area lying outside as well as inside the marginal sea. Both senses are natural, and, *a priori*, no reason exists to prefer one to another.

Nor does the legislative history of the Claims Settlement Act "plainly and unambiguously" indicate that Congress intended to extinguish these possessory interests. The great weight of that history indicates that the Act does not apply to the OCS. Committee Reports on the bill repeatedly state that the extinguished aboriginal claims were intended to apply "to the lands which now comprise the State of Alaska." *E.g.*, S. Rep. No. 925, 91st Cong., 2d Sess. 46, 47 (1970); H.R. Rep. No. 523, 92d Cong., 1st Sess. (1971). During consideration of the bill, members of Congress, as well as a representative from Interior, consistently expressed the belief that it only extinguished aboriginal claims to "the entire State of Alaska," or a maximum of "375 million acres [of Alaska]."[22] No one voiced the opinion that

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[22] *E.g., Alaska Native Land Claims: Hearings Before the House Subcommittee on Indian Affairs on H.R. 3100, et al.*, 92d Cong. 1st Sess.

the Act would apply to anything other than lands lying within Alaska's territorial boundaries.

In the face of this overwhelming authority to the contrary, the court of appeals concluded that the Claims Settlement Act applied to the OCS. It reached this conclusion largely on the basis of a single inconsequential sentence uttered by an oil industry spokesman at a Senate hearing held two years before a different Congress passed the Claims Settlement Act. An early draft of the Claims Settlement Act extinguished "aboriginal right, title, use, or occupancy of lands *in Alaska*." S. 1830, 91st Cong., 1st Sess. § 3(a) (April 15, 1969); H.R. 10193, 91st Cong., 1st Sess. § 3(a) (1969). Before both a House Subcommittee and a Senate Committee, a representative of the oil industry proposed amending the phrase to read "lands, waters, and submerged areas in Alaska."[23] On its face this amendment did not affect the geographic scope of the extinguishment, for the phrase "submerged areas" was limited by the following prepositional phrase "in Alaska." In comments to the Senate Committee (not to the House Subcommittee), the industry spokesman mentioned, by way of background, that the State of Alaska owned submerged land and that the federal government "held title" to the OCS. *1969 Senate Claims Settlement Hearings* at 140. Two years later a different Congress enacted Section 4(b) of the Claims Settlement Act, a section which extinguishes

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(1971) at 370 (statement of Harrison Loesch, Assistant Secretary of the Interior), 65 (statement of Rep. Aspinall), and 340 (statement of Rep. Begich). *See also, e.g.*, 117 Cong. Rec. 36,854 (1971) (statement of Rep. Aspinall); 117 Cong. Rec. 38,443 (1971) (statement of Sen. McGovern); 117 Cong. Rec. 38,445 (1971) (statement of Sen. Harris).

[23] *Alaska Native Land Claims: Hearings Before Senate Committee on Interior and Insular Affairs on S. 1830*, 91st Cong., 1st Sess. at 149 (1969) [hereinafter *1969 Senate Claims Settlement Hearings*]; *Alaska Native Land Claims: Hearings Before the House Subcommittee on Indian Affairs on H.R. 13142 and H.R. 10193*, 91st Cong., 1st Sess., Part I, at 318 (1969).

"All aboriginal title in Alaska . . . including submerged land . . . both inland and offshore." 43 U.S.C. § 1603(b). The court of appeals found that this passing reference to the OCS in the Senate hearing indicated a congressional intent to apply the Claims Settlement Act to that area.

The court of appeals erred in reaching this conclusion. The strongest proposition supported by the legislative history is that Congress might have extinguished aboriginal title to OCS lands had it considered the issue. The oil industry would have favored extinguishing all Native claims, and this proclivity might have been shared by those federal officials responsible for developing federal lands. Moreover, those Alaska Natives represented by former Chief Justice Arthur Goldberg indicated a willingness to entertain proposals that included extinguishing all rights based on aboriginal title. *See 1969 Senate Claims Settlement Hearings* at 301. Yet this idle speculation cannot substitute for a plain and unambiguous expression of congressional intent. The invariant and prevailing rule is that Congress must "plainly and unambiguously" express its intent to extinguish aboriginal claims. If it neglects a particular claim when passing termination legislation, the resulting legislation cannot be construed as extinguishing that right. The parameters of the extinguishment are set by the congressional selection of the claims to be terminated, not by the penumbra cast by those selections.

For wholly different but equally compelling reasons, aboriginal title to OCS lands and waters is not extinguished by the exercise of paramount federal sovereignty. The "paramountcy" argument hopelessly confuses the controlling law of aboriginal title. Assertions of paramount federal sovereignty complement rather than conflict with aboriginal title claims. Derived from prior occupancy, aboriginal title is a federally-recognized right which is never negated by paramount federal power. *E.g.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 486-93 (1982 ed.). Decisions issued by this Court illustrate precisely this point. Although

the federal government exercised complete (rather than paramount) sovereignty as well as ownership over the territories which later became the western states, aboriginal title was fully protected on these lands. Those possessory claims survived statehood and were found to have been extinguished only by treaty or an act of Congress specifically terminating them. *E.g., United States v. Shoshone Tribe*, 304 U.S. 111, 117-18 (1938).

Since Alaska Natives hold aboriginal title to coastal areas which they have traditionally used and occupied, Interior is precluded from leasing areas subject to these encumbrances. "Considered as sacred as the fee simple of whites," the aboriginal title of Alaska Natives is entitled to the same protection offered a fee simple interest. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). Until such time as Congress extinguishes aboriginal title to the Alaskan OCS, Interior can neither disrupt the hunting and fishing activities of Alaska Natives nor lease lands to which they claim title. *Jones v. Meehan*, 175 U.S. 1 (1899). In the meantime, it must limit leasing to those substantial areas not historically used by Alaska's Native peoples.

II. TITLE VIII OF THE CONSERVATION ACT APPLIES TO THE OCS IN THE EVENT THE CLAIMS SETTLEMENT ACT EXTINGUISHED ABORIGINAL TITLE TO OCS LANDS AND WATERS.

The history and purposes of Title VIII demonstrate that it applies to the same lands and waters as does the Claims Settlement Act. Alaska Natives agreed to have Congress extinguish their aboriginal claims based on the understanding that their subsistence uses on affected lands would be protected. If the Claims Settlement Act applies to the OCS, so does Title VIII.

This conclusion is appropriate in light of the canon of statutory construction governing interpretations of Title VIII. This Court has consistently held that ambiguities in statutes passed for the benefit of indigenous people must

be resolved in favor of those people. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). This canon is fully applicable to the Conservation Act. Not only is Title VIII of the Conservation Act Indian legislation, its legislative history reveals a congressional intent that this canon control the resolution of controversies arising from its implementation. Representative Udall, the chief sponsor of the Conservation Act, explained this intent just prior to the final House vote adopting the Conservation Act:

> While the [Conservation Act] obviously is not Indian legislation in its entirety, the subsistence title and the other subsistence related provisions are. And under well-recognized canons of statutory construction, any ambiguities in the title and other provisions must be resolved in favor of the Alaska Native people.

126 Cong. Rec. 29,279 (November 12, 1980).

While acknowledging that Title VIII of the Conservation Act is inextricably linked to the Claims Settlement Act, the Secretary and the oil companies contend that the two statutes should be construed inconsistently. They claim that the Conservation Act does not apply to OCS oil and gas leases because those interests do not fall within the Act's definition of "Federal lands" or "Public lands."

A. Oil And Gas Leases In The OCS Are "Federal Lands." The United States Unquestionably Holds Title To These "Interests," And The Congress Asserts Title To OCS Lands For Purposes Of Domestic Legislation, In The Conservation Act As Elsewhere.

The claim that oil and gas leases do not fall within the purview of the definition of "Federal lands," presented

neither in *Gambell I* nor *Gambell II*,[24] depends on a suppression of the most pertinent portion of that statutory definition. The Secretary and the oil companies correctly argue that Section 102(2) of the Conservation Act defines "Federal lands" as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2). They further argue, again correctly, that the term "Public lands" is defined as "lands situated in Alaska which, after December 2, 1980, are Federal lands." 16 U.S.C. § 3102(3). Here they stop. Either by design or oversight, they neglect to mention that the statute defines "lands" broadly, sweeping within its ambit *"interests"* in lands and waters. Distinguishing and differentiating between lands and "interests" in lands, Section 102(1) of the Conservation Act defines "lands" as "lands, waters, *and interests therein.*" 16 U.S.C. § 3102(1) (emphasis added).

Section 102(1)'s definition of "lands" establishes that oil and gas leases are "Federal lands." When read together, Sections 102(1) and 102(2) provide that "interests to which the United States holds title" are included within the definition of "Federal lands." Oil and gas leases to OCS lands are unquestionably interests to which the United States holds title. The word "title" merely connotes an ownership right. *E.g.*, BLACK'S LAW DICTIONARY. All relevant authority provides that the United States owns the mineral resources of the Outer Continental Shelf. The most pertinent of these is the OCSLA. That Act provides that the subsoil and seabed of the OCS are subject to the United States' jurisdiction, control, and disposition. 43 U.S.C. § 1332(1). It further provides that the OCS is a "vital national resource reserve" that is "held" by the United States. 43 U.S.C. § 1332(3). This ownership has been lu-

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[24] Since neither the Secretary nor the oil companies raised this issue in the court of appeals, the tribal villages are puzzled as to why they argue it here. *E.g., Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

crative: since the OCSLA's implementation in 1953, the United States has received over $70 billion in royalties and bonuses from oil and gas leasing on the Shelf.[25] *See also* H.R. Rep. No. 590, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450, 1461 ("The lands of the Outer Continental Shelf . . . *belong* to the Federal Government") (emphasis added); *1969 Senate Claims Settlement Hearings* at 140 (oil industry claim that United States "holds title" to the OCS).

Moreover, OCS oil and gas leases would be "Federal lands" even if the statutory definition did not include "interests" in lands. Congress routinely asserts that the United States holds title to the OCS for purposes of domestic legislation, ignoring the legal niceties which surround the status of the United States' dominion over the OCS in the international arena. Two examples of this congressional treatment of OCS lands can be found in the Federal Lands Policy and Management Act (FLPMA) and the Archaeological Resource Protection Act (ARPA). FLPMA, like the Conservation Act, defines the term "public lands." By specifically excluding OCS lands from the class of lands owned by the United States, it indicates that, for purposes of domestic legislation, Congress treats the OCS as though it were owned in a conventional sense. FLPMA provides that: "Public lands means: *Any land and interest in land owned by the United States . . . except:* (1) *lands located on the Outer Continental Shelf;* and (2) lands held for the benefit of Indians, Aleuts, and Eskimos." 43 U.S.C. § 1702(e) (emphasis added).

The Archaeological Resource Protection Act provides yet another example of this congressional treatment of OCS lands. Like the Conservation Act, the ARPA defines "public lands" as those lands the fee title to which is held by the United States. Yet unlike the Conservation Act, the

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[25] Pendley, *Development of the Exclusive Economic Zone*, Vol. 2, No. 1, A.B.A. NATURAL RESOURCES & ENVIRONMENT 29 (1986).

ARPA excepts OCS lands from this definition. Illustrating once again that Congress routinely assumes that the United States holds title to the Outer Continental Shelf, as well as that Congress possesses the capacity to exempt the Outer Continental Shelf from the workings of a statute when it so desires, the ARPA defines "public lands" as:

> (A) lands which are owned and administered by the United States as part of—(i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and
>
> (B) all other lands *the fee title to which is held by the United States, other than lands on the Outer Continental Shelf* . . .

16 U.S.C. 470bb(3) (emphasis added).

While these examples suggest that Congress no doubt understood that the Conservation Act's definition of "Federal lands" included the OCS, the Conservation Act itself provides compelling evidence that this was indeed the congressional understanding. The proof is provided by Section 1001. 16 U.S.C. § 3141. Section 102's definition of federal lands is generally important only for Title VIII, for the geographic scope of other titles generally does not depend on this definition. The scopes of these titles are controlled by other sections of the United States Code, are established by maps, or, as in the cases of Titles IX and XIV, are expressly not dependent upon Section 102's definition. Section 1001 is an exception to this rule. It uses Section 102's definition, plainly providing that "Federal lands" include OCS lands. It states:

> The Secretary shall initiate and carry out a study of *all Federal lands (other than submerged lands on the Outer Continental Shelf)* in Alaska north of 68 degrees north latitude. . . .

16 U.S.C. § 3141(a) (emphasis added). By specifically excepting OCS lands from the definition of "Federal lands,"

Section 1001 compels the conclusion that OCS lands are "Federal lands" for Conservation Act purposes.

B. Oil And Gas Leases In The OCS Are "Public Lands" If The Claims Settlement Act Extinguished Aboriginal Title To The OCS: The Language Of The Two Statutes Is Virtually Identical, And Title VIII Was Expressly Intended To Apply To All Lands Affected By The Claims Settlement Act.

After finding that the Claims Settlement Act applied to the OCS, the court of appeals found that the Conservation Act likewise applied to this area. Its conclusion was based largely on the legislative history of the Conservation Act, which showed that the definition of public lands was intended to cover all lands to which the Claims Settlement Act extinguished title.

The Claims Settlement Act contained no provisions protecting subsistence uses. The initial drafts of the Act embodied the framework of the eventual settlement: the extinguishment of aboriginal title in exchange for money, fee title to fewer lands, and protections for subsistence uses.[26] Although none of the subsistence provisions were adopted, their rejection did not reflect congressional indifference. The Conference Committee represented that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250. To prod Interior into action, the Committee directed "both the Secretary and the State to *take any action necessary* to protect the subsistence needs of the Natives." *Id.* (emphasis added).

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[26] *See, e.g.*, S. 3859, 90th Cong., 2d Sess. (1968); H.R. 13142, 91st Cong., 1st Sess. (1969); S. 1830, 91st Cong., 1st Sess. (April 15, 1969); S.35, 92d Cong., 1st Sess. (1971); S. 835, 92d Cong., 1st Sess. (1971); H.R. 7039, 92d Cong., 1st Sess. (1971).

Congress did, however, address subsistence when it acted to meet its 1978 deadline for settling the legal status of 80 million acres of public lands in Alaska. The deadline was set by Section 17(d)(2) of the Claims Settlement Act. 43 U.S.C. § 1616(d)(2). That statute directed the Secretary of the Interior to withdraw up to 80 million acres of public lands—known as D-2 lands—and to recommend inclusion of these lands in National Parks, Forests, Wildlife Refuges, and Wild and Scenic River Systems. It then gave Congress five years to confirm these recommendations. Representative Udall introduced a D-2 lands bill pursuant to these provisions in 1977. H.R. 39, 95th Cong., 1st Sess. (January 4, 1977). The bill designated lands as D-2 conservation units and provided some rudimentary protections for subsistence uses on those lands.

Alaska Natives found that the proposed bill did not adequately protect subsistence uses. Pointing out that Interior had failed to provide the protections promised by the Claims Settlement Act Conference Report, they objected to the substance as well as the geographic scope of the legislation. To remedy its substantive inadequacies, the Alaska Federation of Natives (AFN) and other Native groups advocated strengthening the subsistence provisions. AFN proposed adding provisions which Congress had previously deleted from the Claims Settlement Act.[27] Since Interior had failed to adequately provide for subsistence uses, Congress proved receptive to the proposal. It ultimately incorporated many of its provisions—including what is now Section 810—in Title VIII. *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120(a).

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[27] *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic River Systems: Hearings on H.R. 39 et al. Before the Subcommittee on General Oversight and Alaska Lands*, 95th Cong., 1st Sess., Part XII at 52-56, 461-75, 489-97 (1977) [hereinafter 1977 House Alaska Lands Hearings].

Alaska Natives also advocated extending the geographic scope of the subsistence title. The subsistence title of the initial D-2 legislation only applied to the lands withdrawn by other sections of the bill. Alaska Natives objected to this limitation, contending that the subsistence title should confirm the subsistence rights guaranteed them in the Conference Report accompanying the Claims Settlement Act. The AFN's position was that, in order to fulfill its obligations under the Claims Settlement Act, Congress had to apply the subsistence title to all lands to which that Act had extinguished title. Mr. Byron Mallot, speaking for AFN, testified that:

> The Alaska Federation of Natives believes this legislation should confirm the subsistence rights of the Alaska Natives, not just to the D-2 lands, but, as Congress plainly intended when it wrote its [Claims Settlement Act] conference report, to all Native subsistence *uses on all Federal public lands*. . . .

1977 House Alaska Lands Hearings, Part XII at 53, 463 (emphasis added).

The AFN proposed amending the D-2 legislation so that the geographic scope of the subsistence title was severed from the geographic scope of the D-2 titles. The mechanism for severing the subsistence title from the D-2 titles was a proposed definition of "public lands." Borrowing language directly from the Claims Settlement Act, the AFN proposed defining public lands as "all Federal lands and interests therein situated in Alaska." *Id.* at 491. *See* 43 U.S.C. § 1602(e). It further proposed extending the geographic scope of the subsistence title to all "public lands." *1977 House Alaska Lands Hearings* at 53, 463. Under its amendments, the D-2 withdrawals would continue to be described by maps, but the subsistence title would apply to all public lands traditionally used by Alaska

Natives for subsistence purposes prior to the passage of the Claims Settlement Act.[28]

The Subcommittee which had received Mr. Mallot's testimony responded swiftly to the AFN's amendment. It passed out of committee legislation incorporating the proposals in early 1978. H.R. 39, 95th Cong., 1st Sess. (Feb. 15, 1978). The legislation severed the subsistence title from the D-2 titles and extended the geographic scope of the subsistence title to all public lands. As suggested by the AFN proposal, these changes were effectuated by adopting AFN's definition of "public lands." *Id.* at Sec. 103. As demonstrated by the following comparison, the AFN definition of "public lands" became Section 102(2):

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[28] The oil companies allege that the AFN subsistence proposal did not include the OCS because it only applied to public lands "located within the exterior boundaries of each of the twelve regional corporations." The argument actually establishes that Title VIII applies to the OCS, since Congress rejected this limitation and extended the subsistence protections to all public lands. Its relevance is otherwise obscure. The boundaries of the regional corporations were commonly understood to include the OCS. (R-44 (Norton) Exhibit I). Moreover, the AFN proposed legislation is unclear as to whether the restrictive phrase "included within the exterior boundaries of each of the twelve regional corporations" applied to public lands or merely to Native lands. The plain language suggests the limitation applied only to the latter.

AFN Proposal	16 U.S.C. § 3102(3)
"Public Lands" means all Federal lands and interests therein situated in Alaska as of the effective date of this Act, except: . . . (2) land selections of the State of Alaska which have been patented or tentatively approved . . . (3) land selections made under ANCSA and not yet conveyed by the Secretary to an ANCSA corporation, unless determined to be invalid, and (4) lands covered by ANCSA section 19(b).	The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except— (A) land selections of the State of Alaska which have been tentatively approved or validly selected . . . (b) land selections of a Native Corporation made under [ANCSA] which have not been conveyed to a Native corporation, unless any such selection is determined to be invalid . . . and (C) lands referred to in section 19(b) of [ANCSA].

The adoption of the AFN's definition ensured that the geographic scope of Title VIII is congruent with that of the Claims Settlement Act. The definition was proposed for the express purpose of protecting subsistence uses on all federal lands to which the Claims Settlement Act had extinguished title. Its language is drawn directly from that Act, for it, like the Claims Settlement Act, defines public lands as "all Federal lands and interests therein situated in Alaska." *Compare* 16 U.S.C. § 3102(1)-(3) *with* 43 U.S.C. § 1602(e). In light of the amendment's express purpose and plain language, its acceptance unquestionably demonstrates that Congress intended to apply the subsistence title of the Conservation Act to all lands affected by the Claims Settlement Act.

Although the legislative history of the Conservation Act does not speak directly to this point, the congressional response to AFN's "public lands" definition strongly sug-

gests that Congress understood that the definition extended the geographic scope of the subsistence title to the OCS. As soon as Congress adopted AFN's definition of public lands, it amended the Conservation Act's savings clause to include the Fishery Conservation and Management Act of 1976. *Compare* H.R. 39, § 701(g), 95th Cong., 1st Sess. (October 12, 1977) *with* H.R. 39, § 716(4), 95th Cong., 2d Sess. (October 15, 1978). With very few exceptions, the Fishery Management Act applies to waters lying between three and two hundred miles offshore. 16 U.S.C. §§ 1801, 1811-12. The Conservation Act could not affect the Fishery Management Act unless it applied beyond the territorial sea. Congress had found no reason to include the Fishery Management Act in the Conservation Act's savings clause before the geographic scope of the subsistence title was extended to all public lands. Its decision to add the Fishery Management Act to the savings clause immediately after adopting AFN's definition of public lands is consistent with a congressional understanding that the term included lands and waters lying outside the boundaries of the marginal sea.

Other pertinent legislative history indicates that the sponsors of the Conservation Act fully understood that the geographic scope of the subsistence title differed from that of the D-2 titles. While the geographic scope of Title VIII was set by the definition of public lands, the coverage of the D-2 titles was delineated by individual maps specifying the lands to be withdrawn. These maps rarely included portions of the OCS. *See, e.g.*, National Wildlife Refuges in Alaska; Description of Boundaries, 48 Fed. Reg. 7,890, 8,017 (February 24, 1983). As evidenced by the numerous comments cited by the Secretary and the oil companies, supporters of the D-2 lands bill continually assured Congress that the D-2 titles would not affect OCS leasing. *See Fed. Pet. Brief* at 40-41. In every instance the representations as to the limited geographic scope of the bill referred to the D-2 titles. In no instance did any member

of Congress make a similar representation as to the scope of Title VIII, though they presumably had the incentive to do so. Their silence evidences a congressional understanding that the subsistence title applied to OCS leasing.

In fact, statements concerning the geographic scope of the D-2 land withdrawals, made during the floor debates, indicate that the prevailing impression was that the term "in Alaska" was geographically descriptive and included the OCS. This understanding was expressed by Representative Udall, the chief sponsor of the Conservation Act, who remarked that "Offshore in Alaska there are 203 million acres of sedimentary basin." 125 Cong. Rec. 9,900 (1979). His use of the term was echoed by Representative Young of Alaska, a member of the House Interior Committee and its Subcommittee on General Oversight and Alaska Lands. Mr. Young also indicated that "in Alaska" extended to offshore waters, stating that "The person who supports offshore drilling in Alaska first over onshore drilling is doing a great disservice to the environment." 125 Cong. Rec. 9,907 (1979). *See also* 126 Cong. Rec. 11,124 (1980) (Senator Cranston) ("we can still meet our need to develop oil and gas in Alaska").

In this regard, the proposition that "in Alaska" would be used most naturally in its geographically descriptive sense is established by the fact that Interior and the oil companies have previously espoused exactly that position. To defeat aboriginal claims to the OCS in the *Inupiat Community* case, both claimed that the term included the OCS. Interior ventured that interpreting the term as only including the territorial sea would be "tortured." The oil companies were more eloquent. They argued:

> Plaintiffs' [the Inupiat Communities'] insistence (p. 65) that the words "in Alaska" in ANCSA be read in their most narrow possible sense is betrayed by their own habitual use in other contexts of the same phrase encompassing the areas

> they claim [the Outer Continental Shelf]. . . . On plaintiffs' own theory as to the restricted meaning of the phrase, all these authorities, and many more, are irrelevant to their claims. *But the less guarded usage, both by plaintiffs and by Congress in ANCSA, is a perfectly natural one.*

Memorandum in Support of Motion of Defendants AMOCO Production Co. for Judgment on the Pleadings at 102 (emphasis added). This argument is as applicable to the Conservation Act as it is to the Claims Settlement Act. If it was "perfectly natural" for Congress to use the term "in Alaska" in a geographically descriptive sense when it passed the Claims Settlement Act, it was "perfectly natural" for Congress to use the word in the same sense when it passed the Conservation Act some nine years later.

III. THE SECRETARY MUST COMPLY WITH SECTION 810 BEFORE LEASING PUBLIC LANDS.

The court of appeals correctly determined that Section 810's language and legislative history required that the Secretary comply with Section 810 before leasing public lands. The requirements of Section 810(a) are set out in two sentences. The first applies before any leasing decisions are made. It requires that the Secretary prepare baseline as well as impact studies, and that he consider alternatives which would reduce or eliminate the need to lease. The second sentence precludes the issuance of any lease which would significantly restrict subsistence uses until he gives notice, holds hearings, and makes the findings required by Section 810(a)(1)-(3).

The Secretary and the oil companies concede that Interior violated the first sentence of Section 810(a) and contend that it need not comply with the second. They base this latter claim on two documents which were prepared after the court of appeals decided *Gambell I* and which were published after the tribal villages subsequently moved for a preliminary injunction. Legal justifications

rather than analyses, the post-sale evaluations find that not one of more than 3700 oil and gas leases to 26.4 million acres of OCS lands triggered the notice, hearing, and findings required by the second sentence of Section 810(a). (Fed. Pet. App. 81a, 107a). The argument is that the second sentence does not apply at the lease sale stage due to the uncertainties of oil and gas exploration and the lack of direct physical impacts attributable to leasing. Under this theory, since Interior can only conclude that a lease "would [in fact] significantly restrict" subsistence uses after exploration proves that the tract contains commercially exploitable quantities of oil and gas, the Secretary need never comply with Section 810(a) at the lease sale stage. *Id.*

As an initial matter, Interior's post-sale evaluations must be rejected on scientific grounds because they are based on inadequate and unreliable information. Since the Secretary and the oil companies concede that Interior failed to prepare adequate baseline and impact studies,[29] they

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[29] Neither the Secretary nor the oil companies has petitioned for review of the lower courts' determination that Interior violated the first sentence of Section 810 when holding the Norton and Navarin sales. In the courts below, the Secretary and the oil companies claimed that Interior had "inadvertently complied" with the first sentence. Alleging that the Conservation Act required no more than that demanded by the NEPA and the OCSLA, they contended that compliance with these statutes assured compliance with the Conservation Act. Both courts rejected this claim on legal grounds, reasoning that since the Conservation Act was intended to supplement existing statutes, it could not be interpreted as demanding less. (Fed. Pet. App. 37a-38a; 9a-12a). The courts also could have rejected the argument on factual grounds. The record demonstrates that Interior failed to complete the studies and perform the analyses contemplated by the first sentence of Section 810 with respect to both sales. For example, at the time Lease Sale 57 was held, no baseline information regarding subsistence uses in Norton Sound was available. Comprehensive subsistence baseline studies of Native subsistence villages in Norton Sound and the Bering Sea areas were not published until January and June of 1984, more than

cannot credibly argue that the post-sale evaluations are accurate. The validity of the post-sale evaluations depends upon reliable subsistence impact studies. If the subsistence impact studies are inadequate, Interior's post-sale evaluations must likewise be inadequate.

The court of appeals did not reach this adequacy question because it ignored the post-sale evaluations. Its treatment of the documents fully comports with applicable principles of administrative law. Prior decisions of this Court teach that Secretary Hodel cannot rely on post-sale evaluations to rationalize why Secretary Watt and Secretary Clark failed to comply with the mandates of Section 810. This Court has long held that "a simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962), *quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Administrative actions must be supported by contemporaneous explanations. They cannot be justified by litigation documents which serve as *post-hoc* rationalizations for actions which are otherwise unlawful. *Camp v. Pitts*, 411 U.S. 138, 142-3 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971). Applied here, this rule precludes Interior from using post-sale evaluations to advance new and different reasons justifying why Secretary Watt and Secretary Clark refused to comply with the second sentence of Section 810 when holding the Norton Sound and Navarin Basin lease sales.

Finally, assuming that the post-sale evaluations are part of the administrative record—which clearly they are not—their conclusions that Section 810 does not apply to leasing

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a year after the sale. *See* JORGENSEN, *supra* n. 11; LITTLE AND ROBBINS, *supra* n. 5.

should be rejected for the reason that they conflict with Section 810's language and purposes. The language of Section 810(a) is particularly compelling on this point. Its use of the word "lease" removes all doubt that it applies to leasing. The second sentence provides:

> *No such . . . lease . . . which would significantly restrict subsistence uses shall be effected until* the head of such Federal agency [gives notice, holds hearings and] determines that (A) such a significant restriction of subsistence uses is necessary, . . . (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

16 U.S.C. § 3120(a)(1)-(3) (emphasis added).

The rationale of *Secretary of the Interior v. California*, 464 U.S. 312 (1984), holds that the congressional decision to insert the word "lease" in Section 810(a) indicates that Congress intended for that section to apply at the lease sale stage. In *Secretary of the Interior*, this Court decided that Section 307(C)(1) of the Coastal Zone Management Act did not require Interior to make a consistency determination at the lease sale stage. 464 U.S. at 315. Its holding was based on the fact that the CZMA did not contain the word "lease" or "leasing," and that its legislative history showed that Congress had explicitly rejected attempts to put those words into Section 307(C)(1). *Id.* at 332-35. The logic of this decision mandates that the second sentence of Section 810(a) be interpreted as applying to leasing. If the critical factor is the word "lease," then the congressional decision to insert "lease" in Section 810(a) evidences a plain congressional intent to have that Section apply at the lease sale stage.

Contrary to the suggestion of the Secretary and the oil companies, the word "would" in the phrase "would significantly restrict" does not dictate a different result. "Would" is a modal auxiliary which has nearly two dozen different meanings, among which are "futurity," "uncertainty," and "probability." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981). Its meaning, in Section 810 as elsewhere, depends on the surrounding context.[30] For purposes of Section 810, this context is provided by the subject and predicate phrases "No such . . . lease . . . shall be effected." This language requires that "would" be given its natural and preferred meaning of "futurity." The Secretary claims he can never know whether a given lease "would in fact" significantly restrict subsistence uses. If "would" is interpreted to mean "would in fact," then the congressional directive that "No lease shall be effected" has no practical consequence. This is an impossible result. Congress used the word "lease" because it intended for Section 810(a) to apply to leasing decisions. Its intent cannot be wholly frustrated by a strained reliance on one of several equally probable uses of a modal auxiliary.

In this regard, the correct standard for determining when the Secretary must undertake the compliance effort envisioned by the second sentence of Section 810(a) is supplied by a host of court of appeals' decisions interpreting virtually identical language in the National Environmental Policy Act. The NEPA requires an environmental impact

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[30] The Court's decision in *INS v. Stevic*, 467 U.S. 407 (1984), stands for precisely this proposition. That case resolved whether the Refugee Act of 1980 changed the standard for deportation proceedings under the Immigration and Nationality Act (INA) from a clear-probability-of-persecution standard to a well-founded-fear-of-persecution standard. Although this Court noted in passing that the use of the word "would" in the INA suggested a probability, it based its holding solely on the context supplied by the surrounding words in the statute and the legislative history of the Refugee Act of 1980. It found no evidence of congressional intent to change the prevailing standard.

statement for all major federal actions "significantly affecting" the qualify of the human environment. 42 U.S.C. § 4332(2)(C). The courts of appeals have rejected arguments that the phrase "actions significantly affecting" means only those actions which "will in fact" significantly affect the human environment. They have held that when substantial questions are raised as to whether a project will have this effect, the agency must prepare an EIS. *E.g., Quinonez-Lopez v. Coco Lagoon Development Corp.*, 733 F.2d 1, 2 (1st Cir. 1984); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177-1178 (9th Cir. 1982). Since the NEPA's "significantly affecting" language connotes a higher level of certainty than Section 810's "would significantly restrict" language, this substantial question test sets a minimum standard for determining when the Secretary must comply with the second sentence of Section 810(a).[31]

Finally, the purposes of the Conservation Act demand that the second sentence of 810(a) be interpreted to apply at the lease sale stage. By enacting Title VIII of the Conservation Act, Congress sought to ensure that public land

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[31] The express language of section 810 strongly suggests that Congress intended that the standard for the "significant restriction" determination in Section 810 be triggered at least as easily as the parallel finding of "significant impact" under NEPA. It provides that whenever NEPA requires the Secretary to prepare an EIS he must give the notice, hold the hearings, and make the findings required by section 810(a)(1)-(3). It states:

> If the Secretary is required to prepare an environmental impact statement pursuant to [NEPA], he *shall* provide the notice and hearing and include the findings required by subsection (a) of this section as part of such [EIS].

16 U.S.C. § 3120(b) (emphasis added).

decisions "cause the least adverse impact possible" on Alaska Natives who depend on subsistence. 16 U.S.C. § 3112(1). It also wanted to ensure that management decisions affecting public lands be calculated to allow, to the maximum extent possible, the opportunity for rural residents engaged in a subsistence way of life to do so. *Id.*; 16 U.S.C. § 3111(5). Congress further sought to ensure that "rural residents who have personal knowledge of local conditions and [subsistence] requirements . . . have a meaningful role" in management decisions affecting fish and wildlife and the subsistence uses of those resources. 16 U.S.C. § 3111(5); § 3112(3); § 3115; § 3120 (a)(1)-(3).

These purposes can only be achieved if the second sentence of section 810 applies at the lease sale stage. Leasing is a critical stage in the OCS development process. Tract selections determine where exploration, development, and production will occur as well as which areas will be exposed to oil spills. Stipulations influence the flow of vessel traffic, the placement of platforms and drilling structures, and the location of on-shore construction facilities. Stipulations also dictate what equipment can be used and what training must be provided by lessees. Moreover, leasing constitutes an irrevocable commitment of resources. Although the Secretary retains broad control over exploration, development, and production activities under the OCSLA, once leases are sold, large sums of money change hands and extensive exploration projects are undertaken. As the First Circuit has recognized, "[e]ach of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). The commitment is legal as well as bureaucratic. The OCSLA empowers the Secretary to cancel leases. But it does not authorize cancellation of leases on the basis of potential restrictions to subsistence uses. *See, e.g.*, 43 U.S.C. § 1334(a)(2)(A). Assuming that it did, the possibility of the Secretary actually taking such a step is

remote in light of the fact that cancellation would entitle the lessee to substantial compensation. 43 U.S.C. § 1334(a)(2)(C).

The critical nature of the lease sale stage requires that the second sentence of Section 810 apply at that stage. In the context of decisions involving the disposition of public lands in Alaska, Section 810's purposes are effectuated through the notice, hearings, and findings required by Section 810(a). Since the Secretary retains absolute and unfettered discretion over OCS development only at the lease sale stage, these requirements must be met at that stage if the purposes of the Act are to be fully implemented. Only at the lease sale stage can subsistence users become meaningfully involved in the decision-making process. Only at the lease sale stage can subsistence values be incorporated into the planning process. And only at the lease sale stage can the Secretary ensure that his proposed management decisions will cause "the least adverse impact possible" or that the "minimum amount of public lands" are leased. For this is the time when the Secretary possesses full authority to refuse to act where the benefits to be gained, though substantial, are outweighed by the risk of a significant restriction to subsistence uses.

IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT EXPLORATORY ACTIVITIES ON PUBLIC LANDS LEASED IN VIOLATION OF THE CONSERVATION ACT SHOULD BE ENJOINED.

After concluding in *Gambell I* that the Conservation Act applied to the Secretary's OCS leasing program, the court of appeals remanded this case to the district court for a determination as to whether the Norton Sound sale should be voided or whether exploration and development activities should be permanently enjoined until such time as the Secretary complied with the mandates of the Conservation Act. This order was a victory for Interior and the oil companies. The tribal villages had strenuously argued,

to both the motions and merits panel in *Gambell I*, that the only appropriate remedy for a violation of Section 810 was an order voiding the sale. *Gambell I*, 746 F.2d at 582. To avoid this result, Secretary Watt and the oil companies had represented that an injunction was the appropriate remedy. Both had argued that the proper remedy "would be the same as that ordered in *California v. Watt*: to enjoin further activities until the Secretary completes the procedures required by the statute." *Brief of ARCO Alaska* at 47-50; *Brief of Fed. Appellees* at 47-49. (To avoid discussion, relevant portions of these briefs are reproduced in their entirety in the appendix at 5a, 6a).

Having represented to the court that an injunction was the appropriate remedy for a violation of Section 810, Interior and the oil companies now claim that the court of appeals erred in reaching this conclusion. They argue that it ordered this remedy only because it applied a *per se* rule requiring the issuance of an injunction for every Section 810 violation. They further allege that the application of this alleged *per se* rule violates this Court's holding in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Whether the court of appeals relied on a *per se* rule in this case is subject to question. On the one hand, its opinion expressly finds that the district court misapplied traditional equitable principles. *Gambell II*, 774 F.2d at 1416. On the other hand, when discussing the public interest, it suggests that, absent unusual circumstances, a refusal to enjoin a continuing violation of Section 810 would be an abuse of discretion. *Id.* at 1424-25. The difference is academic. The court of appeals would have been justified in finding either that traditional equitable principles required the issuance of injunctive relief under the special facts and circumstances of this case or that the Secretary's failure to comply with Section 810 warranted injunctive relief except under unusual circumstances.

A. The Tribal Villages Are Entitled To Injunctive Relief Under Traditional Equitable Principles.

Traditional equitable principles find that the tribal villages were entitled to injunctive relief. They were certain of success on the merits. The balance of hardships tipped decidedly in their favor. The public interest weighed heavily in favor of the injunction.

The balance of hardships unquestionably tipped in favor of the tribal villages, for neither the Secretary nor the oil companies demonstrated that they would suffer any irreparable harm if the injunction issued. In the Secretary's case this conclusion was axiomatic. Tacitly conceding that the government would suffer no harm if the courts authorized injunctive relief, the Secretary never alleged that the issuance of an injunction would irreparably harm any governmental proprietary interest. *Gambell II*, 774 F.2d at 1424-25. The conclusion was only slightly less compelling in the oil companies' case. Before the court of appeals, the oil companies' principal claim of harm was that, if the injunction issued, they would suffer financial losses attributable to the disruption of contracts signed after the court of appeals decided *Gambell I*. *Id.* at 1427. The harm was not judicially cognizable. A party cannot alter the balance of hardships by bootstrapping itself into a position of harm. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 767-70 (1983); *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1256 (9th Cir. 1984) (*en banc*). Once the oil companies had notice of the business risks inherent in proceeding with exploration in the face of the Secretary's violation of the Conservation Act, their assumption of the risk could not alter the previously existing balance of hardships.[32]

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[32] The same reasoning precludes claims of financial losses attributable to the purchases of the leases since, as demonstrated at pages 49-50 *infra*, the oil companies were fully informed as to the risks inherent in proceeding with both sales.

In contrast, the tribal villages established that they would suffer irreparable harm should the injunction not issue. This Court has long recognized that violations of statutory prohibitions are judicially cognizable harms which must be considered in determining whether injunctive relief is appropriate. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315 (1982); *TVA v. Hill*, 437 U.S. 153, 193-95 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940). *See* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). This harm is present here, for Interior's violations of Section 810 "poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact Section 810." *Gambell II*, 774 F.2d at 1424. Moreover, exploratory drilling and its associated activities pose real and significant dangers to the fish and wildlife forming the basis of the villages' subsistence economy. As demonstrated by Interior's own studies, noise attributable to airplanes, ships, and other mechanized traffic could effect reductions in the populations of whales, seals, walrus, and birds inhabiting the Norton Sound Basin.[33] As further demonstrated by these studies, oil spills attributable to exploratory drilling could prove devastating for Alaskan villages extremely dependent upon the subsistence economy.[34] Indeed, it was these

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[33] NORTON FEIS, *supra* n. 8, at 167-69, 177-80, 184-85.

[34] Interior forecast three major oil spills during the exploration and development stages and predicted that at least one would be of catastrophic proportions. NORTON FEIS, *supra* n. 8, at Table IV.A.4.b-1, 109. An oil spill could kill whales, *id.* at 188-89; seals and walrus, *id.* at 172-74; waterfowl, *id.* at 167-69; and fish populations, *id.* at 157-59. In its post-sale evaluation the agency altered this estimate to a 78% chance of one or more oil spills of 1,000 barrels or more during the development and production stage, but predicted none during exploration. (Fed. Pet. App. 81a). Any of these spills could be devastating for rural Alaskan villages. For example, a large oil spill could destroy the walrus haul out areas near St. Lawrence Island, a true disaster for the people of St. Lawrence Island who depend on subsistence re-

facts which led the court of appeals to conclude that the "by-products of oil and gas exploration such as potential oil spills, leakage, and noise" threatened to disrupt subsistence hunting and fishing to the extent that it could "destroy irreparably the isolated and unique culture of the Native Alaskans." *Gambell II*, 774 F.2d at 1426.

Finally, the public interest weighed heavily in favor of the injunction. Since Congress possesses the ultimate authority to order the nation's priorities, the best expression of the public interest is validly enacted legislation. Here that legislation requires the Secretary to follow the specific procedures set out by Section 810(a). If proper deference is accorded congressional authority, the public interest must be found to favor injunctive relief. As stated by the court of appeals:

> The district court's finding that the public interest favored oil exploration over the preservation of the subsistence culture of the Alaskan Natives violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans.

Gambell II, 774 F.2d at 1426 (emphasis in original). (Fed. Pet. App. 21a).

B. A Continuing Violation Of Section 810 Of The Conservation Act Warrants Injunctive Relief In The Absence Of Unusual Circumstances.

The court of appeals would likewise have been justified in issuing the injunction solely on the ground that the only available remedies for a violation of Section 810 are an order voiding the sale or an order enjoining exploration until compliance is achieved.

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sources for over 80% of their food. LITTLE AND ROBBINS, *supra* n. 5, at 294, 334, 343-44. *See also* JA 66-68; 73-80.

While the Constitution vests the power to interpret federal law in the judiciary, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and while the courts will not lightly imply a congressional intent to limit their power, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), Congress can limit the exercise of the courts' discretion. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). Whether a given statute divests the courts of equitable discretion depends upon its language and purposes. The governing principle, as laid down by this Court, is that "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978). If the language and purpose of a given statute can only be effectuated by injunctive relief, the courts have no authority to withhold this remedy. In this instance, no "balancing of equities or . . . the invocation of the generalities of judicial maxims" is permitted. *United States v. San Francisco*, 310 U.S. 16, 30 (1940). When a statute's language and purposes foreclose alternative relief, to balance the equities would substitute the judgment of the judicial branch for that of the legislative.

Determining whether a statute permits remedies other than injunctive relief involves a particularized inquiry into its language and purposes. This Court's decisions in *TVA v. Hill* and *Weinberger v. Romero-Barcelo* illustrate the nature of that inquiry. *TVA v. Hill* involved a request for an order enjoining the completion of a dam which threatened the critical habitat of an endangered species in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* The statute contained a flat ban on the destruction of critical habitats of endangered species. Since an injunction was the only available remedy for ensuring that the ban was respected, this Court felt bound to issue an order enjoining completion of the project. It stated:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.

By contrast, this Court in *Weinberger v. Romero-Barcelo* rejected the claim that a court was required to enjoin the Secretary of Defense from operating a training facility in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* Its decision rested on its conclusion that the statute permitted a number of remedies other than the issuance of an immediate prohibitory injunction. Of crucial importance to this determination was that the timing of compliance was not a critical factor: the Act recognized the impracticability of achieving immediate compliance; its provisions only required an immediate cessation when pollution presented a health hazard; and the usual remedy for a violation of its strictures was an order establishing a detailed compliance effort aimed at achieving future compliance. 456 U.S. at 316-20. This Court noted that "the [fact that the] scheme as a whole contemplates the exercise of discretion and balancing of equities [on the part of the executive agency charged with enforcing the statute], militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute." 456 U.S. at 316. Since the Act did not require immediate compliance, this Court found that it contemplated relief other than an immediate prohibitory injunction.

Because Section 810 flatly prohibits leasing from proceeding in violation of its mandates, the only potential remedies for its continuing violation are an order voiding

the sales or an order maintaining the *status quo* until compliance is achieved. Section 810 governs the use and disposition of government lands—a power which the Constitution provides is the exclusive concern of Congress.[35] Its legislative history reveals that it is a remedial statute enacted for the sole purpose of remedying Interior's failure to adequately protect the subsistence uses of Alaska Natives. *E.g.*, 126 Cong. Rec. 29,278 (November 12, 1980) (statement of Rep. Udall). That history also indicates that Section 810 implements these policies by restraining the exercise of executive discretion so that the subsistence uses and needs of Alaska Natives are "incorporated into existing land use planning processes." S. Rep. No. 413, 96th Cong., 2d Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5178.

To ensure that subsistence uses are in fact "incorporated into . . . planning processes," Congress conditioned Interior's power to lease public lands. The statute prohibits dispositions of the public lands in Alaska unless the concerned agency studies subsistence uses, evaluates how those uses will be affected by proposed dispositions, holds certain hearings, and makes three specified findings. As a substantive matter, it prohibits any unnecessary development which would unreasonably interfere with subsistence uses.[36] The timing of compliance is crucial. Expressing a congressional determination that compliance must precede leasing, the plain language of Section 810(a) directs the Secretary to comply with the first sentence "[i]n determining whether . . . to lease" and mandates that "no such . . . lease . . . shall be effected" until he complies with

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[35] U.S. Const. art. IV, § 3; *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840).

[36] The substantive protections of Section 810 are supplied by the findings. They are substantive to the extent they require the existence of certain conditions and are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706.

the second. 16 U.S.C. § 3120(a). Confirming this plain language, the legislative history of Title VIII reveals that Congress intended that "until the requirements of . . . section [810] have been satisfied the proposed action *may not* proceed." S. Rep. No. 413, 96th Cong., 2d Sess. 234, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5178 (emphasis added).

This congressional ordering of the disposition of public lands in Alaska can only be effectuated by an order voiding the action taken or an order maintaining the *status quo* until compliance is achieved. Congress has decided that leasing is a critical stage in the planning process and that compliance must precede leasing. Only two remedies can effectuate and implement this congressional directive. If the Secretary can approach a post-sale compliance effort with an open mind, and the tribal villages submit that he cannot, the proper remedy is an order maintaining the *status quo* until he complies. If he cannot, the proper remedy is an order voiding the sales. The plain language and purpose of the statute simply countenance no other alternative.

V. THE COURT OF APPEALS CORRECTLY FOUND THAT THIS CASE DID NOT INVOLVE A RETROACTIVE APPLICATION OF THE CONSERVATION ACT.

The Secretary as well as the oil companies also claim that the Conservation Act should not be applied to the Norton Sound and Navarin Basin lease sales even if the Act generally applies to OCS leasing. They rely on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to rebut the "presumption in favor of retroactive" application which, in this Court's words, "can seldom be overcome." *Los Angeles v. Manhart*, 435 U.S. 702, 719, 729 (1978). The decision in *Chevron Oil* sets out the criteria which must be met to rebut the presumption favoring retroactive application. The test requires that a party show: (1) a justifiable reliance

on a well-established interpretation or rule of law; (2) an overall benefit flowing from prospective application; and (3) a balance of equitable considerations tipping in favor of a prospective application. 404 U.S. at 106-107. Designed to ensure that behavior based on reasonable expectations is not unconscionably penalized, the rule identifies those situations when the development of new legal principles should not be applied to past action.

Chevron Oil Co. is irrelevant to the Secretary's and the oil companies' claim that the Conservation Act should not apply to OCS lease sales 57 and 83. The record in this case demonstrates that the Conservation Act has not been applied retroactively. Retroactive application by definition involves the application of new law to past actions. In this case, the legal challenges were made *before* the parties acted. Since the legal challenges preceded the actions complained of, the factual predicate for claiming that the Conservation Act is being applied retroactively does not exist. *See Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 709 (7th Cir. 1982), *cert. denied*, 464 U.S. 1017 (1983).

The operative and uncontroverted facts are set out by the lower court's opinion. Congress passed the Conservation Act in December of 1980. *Gambell I* was filed on March 4, 1983, about two weeks before Interior held the Norton Sound sale. It was submitted to the court of appeals following oral argument on October 7, 1983. While the case was submitted, the Secretary determined to hold another lease sale. He did so "with knowledge that his right to do so without complying with the Conservation Act was in doubt." *Gambell II*, 774 F.2d at 1427. The oil companies that were parties to *Gambell I* bid on the leases offered at this sale. They placed their bids "with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending." *Id.*

These facts do not support the claim that the lower court applied a novel interpretation of the Conservation Act to lease sales held before the Secretary and the oil companies had notice that their interpretation of the Conservation Act would be challenged. This case involves only two lease sales. One was subjected to a Conservation Act challenge before it was held. The other was held after *Gambell I* was submitted—when both the Secretary and the oil companies had actual notice of the potential problems associated with holding an OCS lease sale in Alaska without complying with that Act. Since the two sales at issue were held after all parties had notice of the Conservation Act challenge, this case does not involve the issue of whether the Conservation Act should be applied retroactively. Rather than embodying a retroactive application of a new and unexpected statutory interpretation, the court of appeals' decision merely illustrates the established rule that a litigated case acts as a *lis pendens*, placing on notice all bidders at sales held subsequent to its filing. *E.g., Conservation Law Foundation v. Andrus*, 623 F.2d 712, 720 (1st Cir. 1979); *North Slope Borough v. Andrus*, 486 F. Supp. 326, 331 (D. D.C. 1979).

CONCLUSION

The court of appeals should be affirmed. Alternatively, the Court should grant the tribal villages' cross-petition and issue a writ of certiorari directing the lower court to consider the aboriginal title claims of Alaska Natives to those portions of the OCS which they have traditionally used and occupied.

Respectfully submitted,

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